PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17120

Application of SQF, LLC approval to offer, render, furnish or supply telecommunications services as a Competitive Access Provider throughout the Commonwealth of Pennsylvania

Public Meeting – November 5, 2015
2490501-TUS
Docket No. A-2015-2490501

STATEMENT OF COMMISSIONER ROBERT F. POWELSON

Before the Pennsylvania Public Utility Commission (Commission or PUC) today is the application of SQF, LLC (SQF) for a Certificate of Public Convenience and Necessity (CPCN or certificate). I support the Joint Motion to revise the proposed Order granting the certificate because it warns SQF about the importance of being respectful of property rights and attempts to get at the practice of potentially misreporting revenues. However, I am compelled to vote "no" on the underlying Order because I have serious concerns about whether the Commission can legally issue the requested certificate.

Proposed Business Operations

SQF seeks certification under the label of "competitive access provider" (CAP). The term CAP predates the Telecommunications Act of 1996 and refers to a competitive landline network designed to carry *intrastate toll* traffic from a large end user (or an interexchange carrier) to the Public Switched Telephone Network (PSTN).[1] This term does not at all accurately describe what SQF proposes.

SQF's business plan is to become an operator of a "distributed antennae system" (DAS) network, the capacity of which will be leased to retail commercial mobile radio service (CMRS) providers, such as AT&T Wireless, in order to provide a conduit to mobile phone end-use

[1] The term "competitive access provider" is not defined in the Commission's regulations, although CAPs have been regulated for some time by this Commission. The term originally was coined to refer to facilities that bypass and arbitrage an incumbent local exchange company's high access (toll) rates. The CAP designation of "interexchange transporter" was deleted from our regulations in 2007 as being "archaic." *Final Rulemaking for Revision of Chapter 63 of Title 52 of the Pennsylvania Code Pertaining to Regulation of Interexchange Telecommunications Carriers and Service*, Docket No. L-00050170, Final Rulemaking Order entered August 13, 2007 at 15-16.

customers.[2] Stated another way, SQF proposes to provide infrastructure on the retail customer side of the CMRS carrier's network that will collect and deliver end-user traffic and transport it on a wholesale basis.[3] To use a traditional local exchange analogy, DAS providers build and operate the CMRS industry's local loops.

SQF's antennae will be placed on municipal light posts, utility poles, buildings, and other structures either privately owned or in public rights-of-way. The content will be mobile voice, Internet browsing, texting, streaming video and all of the other functionalities of smart phones.

SQF's business plan does not touch the safety and interconnection issues with which the Commission is normally concerned. SQF is not responsible for the hand-off to the 911 center – the CMRS carrier is responsible for those. SQF will not interconnect with other carriers or the PSTN – that's all handled by the retail CMRS carrier. SQF does not need phone numbers – end-user numbering is the retail CMRS carrier's function.

Can the PUC Certificate DAS?

After careful consideration, I conclude that SQF's service is outside of the Commission's lawful jurisdiction. I believe that SQF's service falls into the definition of CMRS service under the Federal Communications Act[4] and the term "mobile domestic cellular radio telecommunications service" used in the Public Utility Code. SQF, in my opinion, is a wholesale CMRS carrier.[5]

Under State law, CMRS carriers are expressly excluded from the definition of "public utility"[6] and, hence, may not be regulated by the Commission. Federal law expressly preempts

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[2] SQF's network, basically, will be composed of antennae (the "node" that will accept end-user wireless traffic) and some form of terrestrial transport (most likely fiber) that will connect at the CMRS carrier's "hub" (such as a carrier hotel).

[3] DAS growth is explosive, "posing new logistical deployment challenges" as the FCC noted last year. *In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, FCC No. 14-153, ¶ 34, 29 FCC Rcd. 12,842 (Report and Order released Oct. 21, 2014), 80 Fed. Reg. 1238 (Jan. 8. 2015) ("*2014 Wireless Infrastructure Order*"). "DAS and small-cell deployments are a comparatively cost-effective way of addressing increased demand for wireless broadband services, particularly in urban areas. As a result, providers are rapidly increasing their use of these technologies, and the growth is projected to increase exponentially in the coming years." *Id.*

[4] "Commercial mobile radio service" (CMRS) is defined under the Communications Act as "any mobile service[,]" as defined in section 153 of this title, "that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public[.]" 47 U.S.C. § 332(d)(1).

[5] The FCC has ruled that DAS and small cell technologies are supporting "Commission [FCC]-licensed or authorized antennas and their associated facilities." *2014 Wireless Infrastructure Order*, *passim*.

[6] 66 Pa. C.S. § 102; *see* § 102(2)(iv) (relating to exclusions from the definition of "public utility"), excluding "mobile domestic cellular radio telecommunications service" from the definition of "public utility." No definition of that term is provided.

any attempt by the Commission to regulate either market entry of, or the rates charged by, a carrier providing CMRS.[7]

As the FCC ruled last year, the determination of whether SQF's service is CMRS or some other type of wireless service is a factual matter. [8] It would be proper, therefore, for the PUC to investigate this issue prior to the issuance of a certificate but no such analysis has been undertaken here.

The arguments attempting to legally justify certification of DAS are not compelling: [9]

- One argument is that we should certificate an entity simply because it is a wholesale carrier. While the Commission has properly certificated wholesale providers before, the fact that an entity may offer "wholesale service" is only a partial analysis. Sprint[10] was found to be within the Commission's jurisdiction because their service was interconnected with the PSTN and in order to promote landline-landline competition. However, there is nothing in Title 66 that empowers us to increase CMRS network capacity or promote improved CMRS signal strength.
- A second argument is that the denial of a CPCN creates a barrier to entry or a "prohibition" of DAS service in violation of Federal law. [11] To the contrary, by declaring that a DAS provider can operate without certificate, the PUC is liberating the DAS provider from regulatory oversight.
- Finally, the argument that DAS providers offer landline transport services and, therefore, are drawn into our jurisdiction is also faulty. As part of its overall service, the DAS provider directly collects (and transmits) mobile end-use traffic. It is incorrect to divide the service into segments and then ignore the one that is inconvenient to the

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[7] 47 U.S.C. § 332(c)(3).

[8] *2014 Wireless Infrastructure Order* at ¶ 271.

[9] New Jersey, for example, recently certificated SQF. *See In the Matter of the Verified Petition of SQF, LLC D/B/A Tilson for Authorization to Provide Local Exchange and Interexchange Telecommunications Services Throughout the State of New Jersey*, NJ Board of Public Utilities Docket No. TE15060727 (Order dated August 19, 2015). Similarly, California certificated NextG (Crown Castle), which is also a DAS provider. *See Application of NextG Networks of California, Inc. (U6745C) for Authority to Engage in Ground-Disturbing Outside Plant Construction*, CA PUC Case No. 08-04-037, (Decision Denying Complaint, Adopting Negative Declaration, And Approving Application dated October 14, 2010), *aff'd in part, rev'd in part, City of Huntington Beach v. California Pub. Util. Comm.*, 154 Cal. Rptr. 3d 241 (4th Cir. 2013). Unlike Pennsylvania, however, neither New Jersey nor California appear to have a statute prohibiting the regulation of CMRS providers.

[10] *See Application of Sprint Communications Company L.P. For Approval of the Right to Offer, Render, Furnish or Supply Telecommunications Services as a Competitive Local Exchange Carrier to the Public in the Service Territories of Alltel Pennsylvania, Inc., Commonwealth Telephone Company and Palmerton Telephone Company*, PA PUC Docket Nos. A-310183F0002AMA, A-310183F0002AMB and A-310183F0002AMC (Opinion and Order entered December 1, 2006).

[11] 47 U.S. Code § 253(a).

jurisdictional argument. Indeed, the FCC has ruled that DAS may be a "personal wireless service" including CMRS.[12]

Why Are DAS Providers Seeking Certificates?

SQF has candidly stated that the principal, if not exclusive, reason for its Application is that, without a FCC spectrum license, municipal cable franchise, PUC certificate or some other written government verification, a DAS operator will find it *difficult* to attach to utility poles, impose on municipal fixtures or occupy the public right-of-way.[13] Thus, SQF is asking us to grant a CPCN – not as a matter of regulatory policy or public protection – but to confer property rights so that CMRS signal enhancing facilities can be more easily constructed.

Obviously, this is not a reason to issue a CPCN, but more importantly, I am not sure that the concern over attachment rights is even valid. Consider that:

- Congress and the FCC have broadly superseded local land use authority over traditional CMRS towers and, more recently, DAS antennae, as a matter of Federal policy favoring wireless deployment.[14]
- The FCC's 2009 *Shot Clock Ruling*[15] that prescribed specific time frames for municipal review and permitting of wireless antennae directed that permit denials must be based upon "substantial evidence," prescribed review of environmental impacts, prohibited discriminatory treatment, and established an accelerated judicial review of permit denials.
- The FCC's *2014 Wireless Infrastructure Order* definitively established that DAS siting applications for facilities that are to be used for the provision of personal wireless services are also subject to the 2009 *Shot Clock Ruling* and the presumptively reasonable timeframes it established.[16]
- At the end of 2012, Pennsylvania enacted the Wireless Broadband Collocation Act (Act 191), which provides for a streamlined approval process for certain qualifying wireless collocations, modifications and replacements of existing facilities, including DAS.[17] Act 191 extends the wireless industry's rights beyond Federal law, including a

[12] "Personal wireless services" is defined as "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services." 47 U.S.C. § 332(c)(7)(C)(i).

[13] And that the Commission has previously certificated DAS providers.

[14] *2014 Wireless Infrastructure Order* at n.593.

[15] *In Re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance,* FCC No. 09-99, 24 FCC Rcd 13994 (Declaratory Ruling Released Nov. 18 2009) ("*Shot Clock Ruling*"). The FCC *Shot Clock Ruling* presumptively set the time frames of what constituted "a reasonable period of time" for a city to act in response to an application to occupy a municipal right of way. *Shot Clock Ruling* at ¶ 37.

[16] *2014 Wireless Infrastructure Order* at ¶ 271.

[17] 53 P.S. § 11702.1, *et seq.*

definition of eligible facilities and a 90-day deadline for decisions on license approvals. Remedies are in the county courts of common pleas, which decisions are to be rendered on "an expedited basis."[18]

Thus, it would seem that DAS providers have developed a favorable environment for ensuring that their equipment can be effectively positioned without a certificate from the PUC.

Conclusion

My concern is simple. A wireless service provider, whose sole function is to aid the provision of wireless *mobile* services, is asking the Commission to issue a certificate to enter the market in apparent contravention of both State and Federal law. The Commission has no contact with this industry and exercises no oversight. The Commission, sitting here today, has no basis upon which to assess the impacts of CPCN issuance upon local municipalities, private property owners or the CMRS industry itself.

The practice of certificating these carriers has not been without negative consequences. There have been several reported instances where the DAS carriers have forced their way onto private property and municipal facilities using their PUC-issued CPCN. On the other hand, at least one certificated DAS carrier now states that all of its revenues are *interstate* and, therefore, it refuses to pay any regulatory assessment, thereby forcing other jurisdictional carriers to subsidize the Commission's dealings with DAS carriers when problems do arise.[19] It is beyond my comprehension that we issue a certificate to offer *intrastate* services to an entity that then asserts that all revenues are *interstate*.

The entire situation is self-contradictory. Under State law, by certificating a DAS provider as a "public utility", we require tariffs and must ensure that the rates charged are "just and reasonable" – something that Federal law prohibits us from doing. In other words, certificating these DAS carriers results in either a violation of either State or Federal law. Thus, we place ourselves at a perilous intersection.

My concern over DAS provider certification has been growing for some time. In the last DAS application case, I reluctantly voted to approve a CPCN in an effort to ensure consistency with our past practices, because the PUC had done so before.[20] As the DAS industry and Federal regulation has evolved, however, so too has my thinking. In my opinion, the Commission should suspend any further certification of DAS carriers and consider the status of those that we have previously certificated.

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[18] I would note that that there is no role for the PUC under Act 191 and that the premise of Act 191 seems incongruous with the "public utility" status of the DAS provider. Because certificated "public utilities" may override local zoning requirements, requiring DAS providers to be certificated as "public utilities" would seem to render the provisions of Act 191 relating to DAS rights on certain facilities within local municipalities unnecessary.

[19] *See* 66 Pa. C.S. § 510 (relating to assessments). The claim that all revenues are interstate is based upon Federal rules. 47 C.F.R. § 36.154(a).

[20] *In Re Application of Gamma Ventures, LLC for Certificate of Public Convenience and Necessity to Provide Telecommunications Services in Pennsylvania*, PA PUC Docket No. A-2014-2412630 (Order entered June 19, 2014), Joint Statement of Chairman Robert F. Powelson and Vice Chairman John F. Coleman, Jr.

Toward that end, I support opening a docket to accept public comment on the issues raised by DAS provider regulation, including:

- The configuration and operation of DAS[21] provider networks;
- DAS provider practices in the field, particularly in the area of facilities siting;
- The business value of a CPCN to a DAS provider;
- The effect upon local governments and private property owners of conferring DAS providers with "public utility" status under the Public Utility Code;
- The effect upon the CMRS industry of our certification of some, but not all, CMRS network providers;
- The legal parameters of our CPCN authority as it relates to DAS providers;
- Whether the revenues associated with DAS may be considered intrastate, interstate or both; and
- Any other relevant topic.

To the best of my knowledge, these issues have never been raised, let alone addressed. It is high time that we develop an understanding of this industry that we purport to regulate. We should not continue to approve these CPCN applications with no real analysis or consideration of the ramifications to the public.

THEREFORE, I vote No.

Date: November 5, 2015

Robert F. Powelson

ROBERT F. POWELSON
COMMISSIONER

[21] This would include any carriers that operate in the small cell sector of the wireless network and is not meant to restrict the focus to one type of technology.